

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

74-1917
74-1946

B
P01 S

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY POLITI, HARRY WEIS, and ARTHUR
FRANGELLO.

Appellants.

*On Appeal from the United States District Court for the
Southern District of New York*

**PETITION FOR REHEARING AND PETITION FOR
REHEARING EN BANC BY ANTHONY POLITI, HARRY
WEIS AND ARTHUR FRANGELLO, AND MOTION IN
THE ALTERNATIVE FOR A STAY OF MANDATE AND
CONTINUANCE ON BAIL FOR THE THREE ABOVE
NAMED APPELLANTS ONLY, PENDING CERTIORARI**

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

IRVING ANOLIK
225 Broadway
New York, New York 10007
(212) 732-3050

Attorneys for Appellants

(7580)

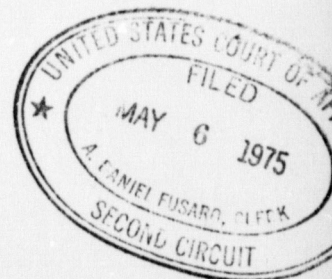
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288



4

TABLE OF CONTENTS

	Page
The Background of the Case	2
The Issue	3
Reasons For Granting Rehearing and Re- consideration	3
Motion in the Alternative For Stay of Man- date Pending Certiorari	15
Certification of Good Faith	15

TABLE OF CITATIONS

Cases Cited:

- Abbate v. United States., 1959, 359 U.S.
187, 79 S. Ct. 666, 3 L.Ed.2d 729 . . . 9, 11, 13
- Ashe v. Swenson, 397 U.S. 436 (1970) . . 7, 11, 13
- Blockburger v. United States, 284 U.S.
299, 52 S. Ct. 180, 76 L.Ed. 306 (1932) . . 10
- Carter v. McClaughry, 183 U.S. 365, 22
S. Ct. 181, 46 L.Ed. 236 (1902) 10
- Clawans v. Rivis, 104 F.2d 240 (D.C. Cir.
1939); 122 A.L.R. 1436 7, 8

Contents

	Page
Downum v. United States, 372 U.S. 734, 10 L.Ed.2d 100	8
Duncan v. Tennessee, 405 U.S. 127, 92 S. Ct. 785, 31 L.Ed.2d 86 (1972)	13
Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L.Ed. 1151 (1915)	10
Ex parte Neilsen, 131 U.S. 176, 9 S. Ct. 672, 33 L.Ed. 118 (1889)	10
Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 55 L.Ed. 489 (1911) . . .	10
Green v. United States, 355 U.S. 184 (1957) . .	7
Grubb v. Oklahoma, 409 U.S. 1017, 93 S.Ct. 450, 34 L.Ed.2d 309 (1972)	13
Harris v. Washington, 404 U.S. 55 (1971) . .	7, 13
Marakar v. United States, 370 U.S. 723, 82 S. Ct. 1573, 8 L.Ed.2d 803 (1962) . . .	12
Miller v. Oregon, 405 U.S. 1047, 92 S. Ct. 1321, 31 L.Ed.2d 590 (1972)	13
Morey v. Commonwealth, 108 Mass. 433 (1871)	10, 12, 14

Contents

	Page
People v. Cox, 107 Mich. 435, 65 N.W. 283	8
Petite v. United States, 361 U.S. 529, 80 S. Ct. 450, 4 L.Ed.2d 490 (1960)	12
Re: Snow, 120 U.S. 274 (1887)	8
Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876, 35 L.Ed.2d 29 (1973)	12, 13
Simpson v. Florida, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971)	13
United States v. Cioffi, 487 F.2d 492 (2 Cir. 1973)	13, 14
United States v. De Angelo, 138 F.2d 466 (3rd Cir. 1943)	10
United States v. Ewell, 383 U.S. 116, 86 S. Ct. 773, 15 L.Ed.2d 627 (1966)	11
United States v. Kramer, 289 F.2d 909 (2 Cir. 1961)	9
United States v. Mallah, 503 F.2d 971 (2 Cir. 1974)	4
United States v. Phillips, 401 F.2d 301 (7th Cir. 1968)	10

Contents

	Page
United States v. Sabella, 272 F.2d 206 (2 Cir. 1959)	13, 14
United States v. Simon, 225 F.2d 260 (3rd Cir. 1955)	10
Waller v. Florida, 397 U.S. 387, 90 S. Ct. 1184, 25 L.Ed.2d 435 (1970)	11
Yawn v. United States, 244 F.2d 235 (5th Cir. 1957)	10
 <u>Statutes Cited:</u>	
18 U.S.C. §1955	2, 3, 4
 <u>Rules Cited:</u>	
N.Y. Penal Law §225.05	3
N.Y. Penal Law §225.15	3
 <u>United States Constitution Cited:</u>	
Fifth Amendment	6, 9
 <u>Other Authorities Cited:</u>	
3 Holdsworth, History of English Law, 614	9

Contents

	Page
Mr. Justice Schaefer's Traynor Lecture, Unresolved Issues in the Law of Double Jeopardy	11
Note, Twice in Jeopardy, 75 Yale L.J. 264 (1965)	11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 74-1917
74-1946

- - - - - x

UNITED STATES OF AMERICA,

Appellee

-against-

ANTHONY POLITI, HARRY WEIS, and
ARTHUR FRANGELLO,

Defendants-Appellants.

- - - - - x

Petition for Rehearing and Petition for
Rehearing En Banc by ANTHONY POLITI, HARRY
WEIS AND ARTHUR FRANGELLO, and Motion In
the Alternative For a Stay of Mandate and
Continuance On Bail for the Three Above
Named Appellants Only, pending Certiorari.

To the Honorable Associate Justice Tom C. Clark, and
Circuit Judges Moore and Timbers:

Anthony Politi, Harry Weis and Arthur Frangello re-
spectfully petition this Court pursuant to its rules for
a rehearing of the determination of this Court made the
28th day of April 1975 affirming the judgments of the
United States District Court, Southern District of New
York (Lasker, D.J.), convicting the petitioners and other
appellants not joining in this Petition, under a two-count

indictment charging a violation of 18 U.S.C. § 1955 and conspiracy to so do (illegal gambling) after trial before Lasker, D.J. without a jury.*

In the event this panel of the Court denies a rehearing, or adheres to its present determination, then petitioners respectfully request that this petition be submitted to all of the Active Judges of the Circuit for determination en banc.

All of the petitioners herein are presently at liberty on bail.

Harry Weis was sentenced to two (2) months; Arthur Frangello to four (4) months; and Anthony Politi to one year. Since it is obvious that the petitioners will have served all or a large portion of their respective sentences if the mandates are not stayed, we are making this request as alternative relief, if certiorari becomes necessary.

THE BACKGROUND OF THE CASE

We incorporate by reference the brief heretofore filed by the appellants from the judgments of conviction. The facts are amply set forth therein and we do not feel

* Another appellant, Michael Camporeale, whose case was severed, went to trial before Lasker, D.J. and was convicted. This Court, however, reversed his conviction.

that it is necessary to re-articulate them herein. Suffice it to say, the indictment charged an illegal gambling business in violation of 225.05 and 225.15 N.Y. Penal Law thereby allegedly violating the organized crime gambling provisions of 18 U.S.C. 1955.

We do not seek to relitigate or ask rehearing of all of the issues.

THE ISSUE

The issue before this Court presented for rehearing and re-consideration is that which related to double jeopardy in violation of the Fifth Amendment.

REASONS FOR GRANTING REHEARING AND RECONSIDERATION:

1. The memorandum decision of the panel herein states, inter alia that "...we are confronted with two completely different and separate gambling operations - one in Westchester County and the other in the Poughkeepsie-Newburgh area".

We submit that these characterizations by this Court are inaccurate. The conspiracy herein is not limited to Westchester nor to the Poughkeepsie-Newburgh area. On the contrary, there is ample, uncontradicted evidence

that events of a crucial nature common to both this case and the prior trial of Politi and Weis, occurred in Rockland County at the Bobbin Inn. The search and seizures at the Bobbin Inn were predicates for the indictments and trials of both the case at bar, and the prior violations of 18 U.S.C. 1955 of which Weis and Politi were acquitted.

The facts of the case at bar reveal events occurring in Orange County, Rockland County and Westchester County. (see pages 15 and 16 of appellants' main brief).

2. As to Anthony Politi there is a threat of triple jeopardy, not only double, since he was charged in the State Court with the events which occurred at the Bobbin Inn at the same time that the predicates for these indictments occurred.

3. Since the memorandum decision of this panel, quoted, supra in pertinent part, confirms the viability of United States v. Mallah, 503 F. 2d 971 (2 Cir. 1974), the fact that this Court inaccurately declared that the conspiracies were confined to different areas, when in fact there are substantial over-laps, impels the petitioners to seek this rehearing to prevent a grave injustice.

There are similarities common to both the present and former indictment (71 Cr. 857). For example, there were 58 "runner codes" identified in the seizures presented in the trial under Indictment 71 Cr. 857. It is stipulated under Exhibit 27 herein that 24 of those same runner codes are found among the runner codes herein! These runner codes were identified in the so-called "Bobbin Inn" seizure. Eleven of the 20 runner codes found on the tapes seized from appellant Peters and admitted in evidence in the case at bar, were also admitted in evidence at the earlier trial.

4. The Court below found that some of the tapes seized at the Bobbin Inn appear to have related to operations in Rockland and Orange Counties and others to Westchester County.

We most respectfully find it difficult to understand how this Tribunal could thus assert that there were two separate and different gambling operations.

5. In addition, the time periods of the operations of both this and the former indictment overlap.

6. The dramatis personae of both operations contain several identical persons common to both cases. Neither

operation was limited to any one county, but on the contrary crossed county lines.

7. Appellant Frangello joins as a petitioner since he was convicted in a State Court of the same or similar facts as adduced in the trial herein (see pp. 30-33 appellant's main brief).

8. We most humbly and respectfully ask this Court to review anew the record on appeal since it is difficult to understand how it could have come to the conclusion that there were separate operations when there are so many over-lapping and similar facts. It is patent that the two operations were not limited as the Court supposed, i.e., one in the Poughkeepsie-Newburgh area, and the other in Westchester. Both joined in Rockland County at the Bobbin Inn, and both had important incidents occurring in several counties, as already noted. We maintain that fairness dictates that this Court grant a rehearing and reconsideration.

The Fifth Amendment provides:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

"The constitutional prohibition against 'double

jeopardy,'" says the United States Supreme Court, "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." The Court explained:

"The underlying idea. . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (Green v. United States, 355 U.S. 184)

The Supreme Court of the United States has held that the double jeopardy clause applies not only to state, but federal prosecutions as well (Ashe v. Swenson, 397 U.S. 436 (1970)). Ashe v. Swenson, moreover, reveals that the doctrine of collateral estoppel is now part and parcel of the double jeopardy prohibition of the United States Constitution. See also, Harris v. Washington, 404 U.S. 55 (1971).

This was a non-jury case, but, nonetheless, jeopardy attached as soon as the Court began to hear evidence (Green v. United States, 355 U.S. 184 (1957); Clawans v.

Rives, 104 F. 2d 240 (D.C. Cir. 1939); 122 A.L.R. 1436).

The Supreme Court has also condemned harassment of the accused by successive prosecutions. Thus, in Downum v. United States, 372 U.S. 734, 10 L.Ed. 2d 100, at 102, 103, the Supreme Court declared:

"Harassment of an accused by successive prosecutions...so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches."

We submit that the evidence herein reveals that there was a continuous crime and that the conspiracies were the same as that embraced in indictment 71 Cr. 857, thus precluding the trial of Politi and Weis certainly, and perhaps of the co-conspirators who are named in both indictments. The Supreme Court has stated that there may be but one prosecution for an offense which is continuous in character (See Re Snow, 120 U.S. 274 (1887); see also People v. Cox, 107 Mich. 435, 65 N.W. 283).

The Court below, we submit misinterpreted this Court's rulings with respect to collateral estoppel and double jeopardy.

In United States v. Kramer, 289 F. 2d 909 (2 Cir. 1961), this Court rejected a governmental contention that collateral estoppel applies only to "an issue essential to a conviction in a second trial" (Id. at 915). Judge Friendly, writing for the Court, explained:

"We see no basis in reason for a limitation so narrow. A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue. . . . [T]o permit the Government to force a defendant who has won an acquittal to relitigate the identical question on a further charge arising out of the same course of conduct, selected by the Government from the extensive catalogue of crimes furnished it in the Criminal Code, would permit the very abuses that led English judges to develop the rule against double jeopardy long before it was enshrined in the Fifth Amendment, 3 Holdsworth, History of English Law, 614, -- and still longer before the proliferation of statutory offenses deprived it of so much of its effect. See Mr. Justice Brennan's separate opinion in Abbate v. United States, 1959, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729. The very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The Government is free, within the limits set by the Fifth Amendment, . . . to charge an acquitted defendant

with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be." *Id.* at 915-916.

See, *Yawn v. United States*, 244 F. 2d 235 (5th Cir. 1957); *United States v. Simon*, 225 F. 2d 260 (3rd Cir. 1955); *United States v. De Angelo*, 138 F. 2d 466 (3rd Cir. 1943). See also, *United States v. Phillips*, 401 F. 2d 301 (7th Cir. 1968)."

Chief Justice Shaw's famous formulation in *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871), quoted with approval in *ex parte Nielsen*, 131 U.S. 176, 187-188, 9 S. Ct. 672, 33 L. Ed. 118 (1889); *Carter v. McClaghry*, 183 U.S. 365, 395, 22 S. Ct. 181, 46 L. Ed. 236 (1902); *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911); *Ebeling v. Morgan*, 237 U.S. 625, 630-631, 35 S. Ct. 710, 59 L. Ed. 1151 (1915); and *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), namely, that "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other," has been somewhat undermined,

if not actually overruled.

While the formulation has not been expressly rejected by the Supreme Court of the United States or this Circuit, it has been seriously criticized. See the separate opinion of Mr. Justice Brennan in Abbate v. United States, 359 U.S. 187, 196, 201, 79 S. Ct. 666, 3 L. Ed. 2d 729 (1959); his concurring opinion, joined by Justices Douglas and Marshall, in Ashe v. Swenson, supra, 397 U.S. 448, 90 S. Ct. 1189; and Note, Twice in Jeopardy, 75 Yale L.J. 264 (1965). See also Mr. Justice Schaefer's Traynor Lecture, Unresolved Issues in the Law of Double Jeopardy; Waller and Ashe, 58 Calif. L. Rev. 391 (1970). No small part of the difficulties in double jeopardy law is traceable to the fact that the same tests have been applied to acquittals and convictions, although the policy considerations relative to reprosecution are quite different.

While the Supreme Court has refrained from employing the Morey formulation in such recent cases as United States v. Ewell, 383 U.S. 116, 124-25, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); Waller v. Florida, 397 U.S. 387, 390, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970); and

Robinson v. Neil, 409 U.S. 505, 511, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973), in at least two cases, Petite v. United States, 361 U.S. 529, 80 S. Ct. 450, 4 L. Ed. 2d 490 (1960), and Marakar v. United States, 370 U.S. 723, 82 S. Ct. 1573, 8 L. Ed. 2d 803 (1962), the Government has avoided testing the continued validity of the traditional formulation by requesting the dismissal of convictions that might have called for reconsideration of the Morey rule. The Government there insisted that its requests for dismissals were based, not on a violation of double jeopardy principles, but on its own policy "that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement," 361 U.S. at 530, 80 S. Ct. at 451. In both Petite and Marakar, three Justices would have rejected the Government's "policy of fairness" approach and would have based reversal directly on the Double Jeopardy clause.

As was explained in footnote 5 by this Court in

the case of United States v. Cioffi, 487 F. 2d 492 (2 Cir. 1973) at 497:

"With the support of Justices Douglas and Marshall, Justice Brennan has continued to hammer away at the Court's reluctance to consider anew what constitutes the 'same offense' for double jeopardy purposes. Sounding a theme that originated with his separate opinion in Abbate and Ashe, he has pressed for adoption of a constitutional requirement of joinder for all charges arising out of a 'single criminal act, occurrence, episode or transaction,' in concurrences, see Simpson v. Florida, 403 U.S. 384, 387, 91 S. Ct. 1801, 29 L. Ed. 2d 549 (1971); Harris v. Washington, 404 U.S. 55, 57, 92 S. Ct. 183, 30 L. Ed. 2d 212 (1971); Robinson v. Neil, 409 U.S. 505, 511, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973), and in dissents from denials of certiorari, see Duncan v. Tennessee, 405 U.S. 127, 130, 92 S. Ct. 785, 31 L. Ed. 2d 86 (1972) (writ dismissed as improvidently granted); Miller v. Oregon, 405 U.S. 1047, 92 S. Ct. 1321, 31 L. Ed. 2d 590 (1972); Grubb v. Oklahoma, 409 U.S. 1017-19, 93 S. Ct. 450, 34 L. Ed. 2d 309 (1972)."

In United States v. Sabella, 272 F. 2d 206, 211 (2 Cir. 1959), this Court held in essence that the double jeopardy clause prohibited a second prosecution after a conviction stemming from the same narcotics transaction.

The Sabella case is further explained in United

States v. Cioffi, supra, 487 F. 2d at 497, 498, where this Court declared:

"Although this court there reaffirmed the Morey doctrine, we refused to extend it to the point of rigid formalism. While the two charged offenses in Sabella each technically included one unique element, the Government was not required to prove either in order to make out a prima facie case. In effect, then, the same proof could support both convictions. In view of the shadow that has been cast over Morey, one is justified in speculating that, unless prosecutors take to heart the recommendations for joinder of all offenses arising out of the same criminal episode or transaction, double jeopardy will be a fertile ground for Supreme Court development in the next decade."

It must be borne in mind further that in the prior indictment herein, namely 71 Cr. 857, there was an acquittal on both counts, namely the conspiracy and the substantive count and, therefore, there was nothing surviving to present to another jury. (See United States v. Cioffi, supra, 487 F. 2d at 498).

MOTION IN THE ALTERNATIVE FOR STAY OF MANDATE
PENDING CERTIORARI.

If the relief requested supra is not granted, then we ask that this Court state the mandates pending the prompt filing of a petition for a Writ of Certiorari.

Respectfully submitted,

s/ Irving Anolik
s/ Herald Price Fahringer

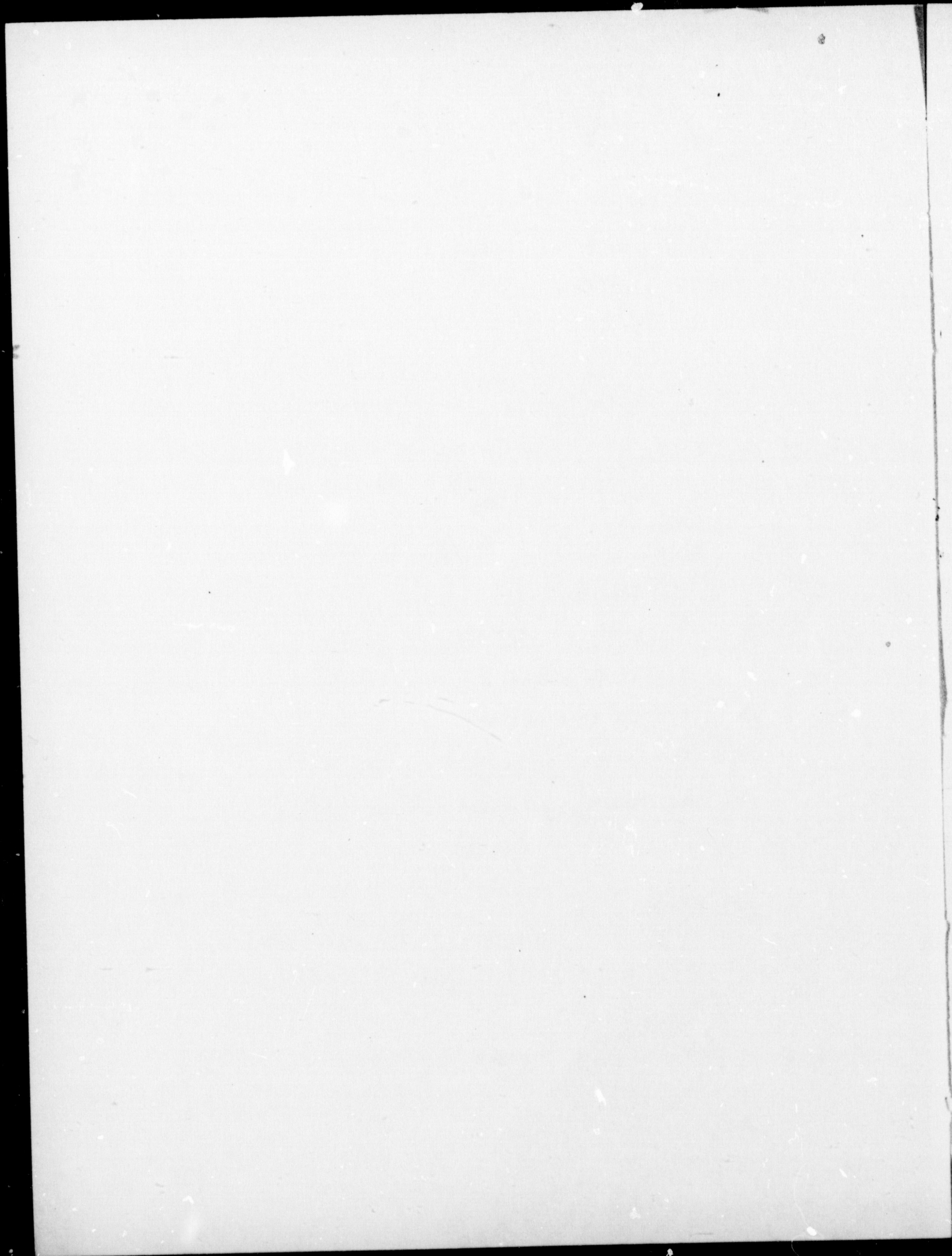
Attorney for Appellants

CERTIFICATION OF GOOD FAITH

I, IRVING ANOLIK, a member of the Bar of this Court, certify that this Petition for Rehearing and Motion in the Alternative for Stay of Mandate pending Certiorari is submitted in good faith and not for the purpose of delay.

May 2, 1975

s/ Irving Anolik
Irving Anolik



UNITED STATES COURT OF APPEALS
for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

ANTHONY POLITI, et al.,

Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

ss.:

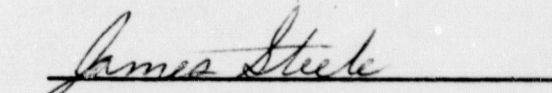
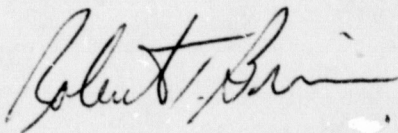
I, James Steele, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
250 West 146th, Street, New York, New York
That on the 6th day of May 1975 at 1 St. Andrews Place, N.Y. N.Y.

deponent served the annexed Petition upon

Paul J. Curran

the Attorney in this action by delivering ² true copy ^{ES} thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 6th
day of May 19 75


JAMES STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977